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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1997

GEORGE K. PRICE and HARRY L. SCHUMAN,

Petitioners,

v.

FCC NATIONAL BANK,

Respondent.

Petition for Writ of Certiorari
To The Illinois Appellate Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the States' historical and fundamental powers to enforce their citizens' contractual rights and to protect them from common law fraud must give way under the Supremacy Clause to the federal Truth in Lending Act, which Act also seeks to protect consumers by requiring meaningful disclosure of credit terms.

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HSN Consultants, Inc., *The Nilson Report* (No. 542, Feb. 1993 & No. 636, Jan. 1997) 7

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To The Illinois Appellate Court

PETITION FOR WRIT OF CERTIORARI

Petitioners pray that a Writ of Certiorari issue to review the judgment of the Illinois Appellate Court entered in this cause on November 22, 1996.

Opinion Below

The opinion of the Illinois Appellate Court is reported at 673 N.E.2d 1068 (1st Dist. 1996) and is reproduced in the Appendix at pp. App. 1 to App. 8.

Jurisdiction

The Illinois Supreme Court denied leave to appeal on April 2, 1997. On June 27, 1997, Justice Stevens granted petitioners' application to extend until August 30, 1997, the time within which this petition could be filed. This Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C. §1257(a).

STATUTES AND REGULATIONS INVOLVED

Consumer Credit Protection
15 U.S.C. §§1601, 1610, 1637(b)(9)
Subchapter I - Consumer Credit Cost Disclosure

Part A - General Provisions

§1601. Congressional findings and declaration of purpose

(a) Informed use of credit

The Congress finds that economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit. The informed use of credit results from an awareness of the cost thereof by consumers. It is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices.

(b) Terms of personal property leases

The Congress also finds that there has been a recent trend toward leasing automobiles and other durable goods for consumer use as an alternative to installment credit sales and that these leases have been offered without adequate cost disclosures. It is the purpose of this subchapter to assure a meaningful disclosure of the terms of leases of personal property for personal, family, or household purposes so as to enable the lessee to compare more readily the various lease terms available to him, limit balloon payments in consumer leasing, enable comparison of lease terms with credit terms where appropriate, and to assure meaningful and accurate disclosures of lease terms in advertisements.

§1610. Effect on other laws

(a) Inconsistent provisions; procedures applicable for determination

(1) Except as provided in subsection (e) of this section, this part and parts B and C of this subchapter do not annul, alter, or affect the laws of any State relating to this disclosure of information in connection with credit transactions, except to the extent that those laws are inconsistent with the provisions of this subchapter and then only to the extent of the inconsistency. Upon its own motion, or upon the request of any creditor, State or other interested party which is submitted in accordance with procedures prescribed in regulations of the Board, the Board shall determine whether any such inconsistency exists. If the Board determines that a State-required disclosure is inconsistent, creditors located in that State may not make disclosures using inconsistent term or form, and shall incur no liability under the law of that State for failure to use such term or form, notwithstanding that such

determination is subsequently amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

(2) Upon its own motion or upon the request of any creditor, State, or other interested party which is submitted in accordance with procedures prescribed in regulations of the board, the Board shall determine whether any disclosure required under the law of any State is substantially the same in meaning as a disclosure required under this subchapter. If the Board determines that a State-required disclosure is substantially the same in meaning as a disclosure required by this subchapter, then creditors located in that State may make such disclosure in compliance with such State law in lieu of the disclosure required by this subchapter, except that the annual percentage rate and finance charge shall be disclosed as required by section 1632 of this title, and such State-required disclosure may not be made in lieu of the disclosures applicable to certain mortgages under section 1639 of this title.

(b) State credit charge statutes

Except, as provided in Section 1639 of this title, this subchapter does not otherwise annul, alter or affect in any manner the meaning, scope or applicability of the laws of any State, including, but not limited to, laws relating to the types, amounts or rates of charges, or any element or elements of charges, permissible under such laws in connection with the extension or use of credit, nor does this subchapter extend the applicability of those laws to any class of persons or transactions to which they would not otherwise apply. The provisions of section 1639 of this title do not annul, alter, or affect the applicability of the laws of any State or exempt any person subject to the provisions of section 1639 of this title from complying with the laws of any State, with respect to the

requirements for mortgages referred to in section 1602(aa) of this title, except to the extent that those State laws are inconsistent with any provisions of section 1639 of this title, and then only to the extent of the inconsistency.

* * *

(d) Contract or other obligations under State or Federal law

Except as specified in sections 1635, 1640, and 1666e of this title, this subchapter and the regulations issued thereunder do not affect the validity or enforceability of any contract or obligation under State or Federal law.

§1637. Open end consumer credit plans.

* * *

Statement required with each billing cycle.

(b) The creditor of any account under an open end consumer credit plan shall transmit to the obligor, for each billing cycle at the end of which there is an outstanding balance in that account or with respect to which a finance charge is imposed, a statement setting forth each of the following items to the extent applicable:

* * *

(9) The day by which or the period (if any) within which, payment must be made to avoid additional finance charges, except that the creditor may, at his election and without disclosure, impose no such additional finance charge if payment is received after such date or the termination of such period.

Regulation Z
12 C.F.R. §226.7(j)

Periodic statement.

The creditor shall furnish the consumer with a periodic statement that discloses the following items, to the extent applicable:

* * *

(j) Free ride period. The date by which or the time period within which the new balance or any portion of the new balance must be paid to avoid additional finance charges. If such a time period is provided, a creditor may, at its option and without disclosure, impose no finance charge when payment is received after the time period's expiration.

STATEMENT OF THE CASE

This case poses important questions as to the Supremacy Clause, principles of federal preemption and the interpretation and application of the federal Truth in Lending Act ("TILA"). Its outcome affects tens of millions of credit cardholders across the United States and bank credit card issuers with a credit volume, insofar as pertinent to this case, of tens of billions of dollars annually.

This litigation commenced in 1992 when petitioners sued FCC National Bank ("FCC") in federal court alleging violations of TILA and state statutory and common law. The federal court held that FCC's failure to disclose, as discussed below, was permissible under an "except" clause, 15 U.S.C. §1637(b)(9), and therefore not a violation of TILA, while declining jurisdiction over the state-based claims. *Price v. FCC National Bank*, 4 F.3d 472 (CA 7, 1993), cert. denied, __U.S.__, 114 S. Ct. 695 (1994) (hereafter referred to as

"*Price-Fed*"). Petitioners then sued FCC in state court asserting common law claims for breach of contract and fraud and for violation of the Illinois Credit Card Issuance Act ("Credit Card Act"). The Illinois Appellate Court upheld FCC's motion to dismiss, concluding that since *Price-Fed* held that FCC complied with TILA, it was deemed in compliance with the state statute. It further held that compliance with TILA meant that petitioners "cannot state a claim for either common law fraud or breach of contract," i.e., petitioners' common law claims were preempted by TILA. *Price v. FCC National Bank*, __Ill.App.3d__, 673 N.E.2d 1068, 1070-71 (1st Dist. 1996) (hereafter referred to as "*Price-Ill*"); App. 1, 7.

FCC's deception and contract breach revolves around its secret practice, designated by FCC itself as a "Shadow Grace Period," whereby FCC advises millions of cardholders every month that in order to avoid finance charges their monthly payments must be paid within 20 days when, in fact, they are not due for 25 days. As a result, every month FCC induces petitioners to pay about $600 million to FCC five days before it is actually necessary to avoid finance charges.[1] This

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[1] There has been no discovery in this case, but the Court may take judicial notice of the following facts from the published documents noted herein. Industry and credit card holder association reports indicate that the average portion of credit card charges that are paid on time without incurring finance charges varies from year to year and has ranged from between 30% to 50%. In 1992, e.g., it was about 40% of all credit card volume. American Bankers Assoc., *1993 Bankcard Industry Report*; Bankcard Holders of America, *Credit Cards: What You Don't Know Can Cost You* (June, 1992). In 1992 and 1996, FCC maintained over 5-1/2 million accounts with a charge volume of almost $18 billion a year. HSN Consultants, Inc., *The Nilson Report* (No. 542, Feb. 1993 & No. 636, Jan. 1997). Thus, for illustrative purposes, FCC card holders, on average, are being deprived of the use of $7.2 billion of their money (40% of $18 billion) for 60 days each year.

deceptive practice deprives petitioners of the use of their own money and allows FCC to use and profit from it enormously, unjustly and in plain violation of its cardholder contract and the proscriptions of common law fraud as well as TILA's and the Credit Card Act's mandate to disclose the actual date by which payment must be made to avoid payment of finance charges.

Petitioners and the class sought to be represented[2] are certain holders of bank credit cards issued by FCC. As a credit card issuer, FCC must comply with the mandate of TILA, 15 U.S.C. §1637(b)(9), *supra*, p.5, to disclose on each monthly statement **"The day by which...payment must be made to avoid additional finance charges...."**[3]

The contract between FCC and its cardholders tracks the federal and state statutory language. It provides in pertinent part (emphasis added):

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[2] Petitioners bring this action on behalf of a class of all holders of FCC credit card accounts between April 1, 1991, and the date of judgment herein, to whom FCC represented a false date upon which the balance on their account was required to be paid to avoid assessment of finance charges. They are customers who pay in full and on time. As to those customers who do **not** pay their prior month's balance in full and incur finance charges, FCC inserts a payment due date on their next month's bill which **is actually 25 days** from the billing date. This action is brought only on behalf of cardholders who are tricked into paying early and have been discriminated against and damaged by the failure to disclose the true due date of their payments.

[3] The Credit Card Act similarly provides that : "... **a credit card issuer shall disclose...on each periodic billing statement, ... the grace period, which is defined as the period within which any credit extended under such credit plan must be repaid to avoid incurring an interest charge....**" (815 ILCS 140/6).

> **4. Billing Statements** — You will receive a billing statement periodically (normally monthly). Your payment is due at our offices on or before the Payment Due Date shown on your billing statement.
>
> * * *
>
> **9. Payments** — Payments and credits posted after your Payment Due Date or totaling less than the entire balance owing will reduce the balance owing as of the date posted (and the average daily balance), but will not avoid Finance Charge. For your information, we receive and process payments every day of the week including Saturdays, Sundays and holidays. If your Payment Due Date falls on a Saturday, Sunday or holiday, the Payment Due Date will not be extended and failure to get the payment to us as specified on your billing statement on or before that date will result in Finance Charge.

FCC does not comply with its cardholder contract. Instead, it sends monthly billing statements to petitioners and the class that contain two boxes — one for the "Billing Date" and one for the "Payment Due Date". If the billing date inserted is, e.g., June 1, FCC inserts a Payment Due Date which is only 20 days later, i.e., June 21. In fact, finance charges are avoided in the above example if payment is made by June 26, or 25 days after the billing date.[4] That is, if the customer's payment is received after June 21 (the "due date" shown on the

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[4] The additional 5 days flows from the undisclosed "shadow grace" period of 5 days, a practice followed by FCC every month for about the past six years.

billing statement) but on or before June 26, no finance charge is due or assessed. In sum, even though FCC advises its cardholders every month that to avoid finance charges payment **must** be made within **20 days,** in fact FCC does not assess finance charges against any customer who pays his balance in full within **25** days. By breaching its contractual promise to state when payment is actually due and by falsely inducing plaintiffs to pay their statements before they are due, FCC obtains use of millions of dollars of their money which it uses for its own benefit for two months a year (see fn. 1, *supra*) .

Although FCC, in this manner, has routinely inserted false due dates in its monthly billing statements for about six years, it has never disclosed that fact by amending its contract or informing the class of its "shadow grace" practice which contravenes the contract's terms. Accordingly, the customers in the class are not aware of FCC's practice and, therefore, send their monthly payments five days earlier than is necessary to avoid finance charges. The Complaint alleges that the foregoing facts plainly establish a breach of contract and common law fraud as well as a breach of the Credit Card Act which requires FCC to "disclose" on "each . . . billing statement to a cardholder" the "period within which any credit extended under such credit plan must be repaid to avoid incurring an interest charge[.]" The Illinois Appellate Court held that petitioners are preempted by TILA from asserting their state based actions arising under common law.[5]

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[5] Petitioners do not challenge here the Appellate Court's interpretation of the state Credit Card Act.

REASONS FOR GRANTING THE WRIT

I. The Appellate Court's Interpretation of TILA Sanctions an Unwarranted And Unprecedented Federal Incursion Into The Historical Powers of The States To Protect Their Citizens' Rights Under Contract And To Be Free From Classic Common Law Fraud.

While Article VI of the Constitution provides that the laws of the United States "shall be the supreme Law of the land;...any Thing in the ...Laws of any state to the Contrary notwithstanding," consideration of issues arising under the Supremacy Clause "'start[s] with the assumption that the historic police powers of the States [are] not to be superseded by...Federal Act unless that [is] the clear and manifest purpose of Congress.' *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 ... (1947)," quoted by Justice Stevens in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S. Ct. 2608, 2617 (1992). Justice Stevens' reiteration of this principle was accepted in the concurring and dissenting opinions of Justices Blackmun, Kennedy, Souter, Scalia and Thomas. See 112 S. Ct. at 2625-26 and 2632.

The Illinois Appellate Court ignored this "assumption" and failed even to consider whether Congress clearly, manifestly or otherwise intended that TILA superseded state common law actions for breach of contract and fraud. This secession of state power is no less improper merely because a state, rather than a federal court has misinterpreted a federal statute.

In fact, Congress has made clear that TILA was not intended to override such state law claims. Thus Congress said (15 U.S.C.§ 1610 (a)(1)): "Except as provided in subsection

(e) of this section, this part and parts B and C of this subchapter do not annul, alter or affect the laws of any State relating to the disclosure of information in connection with credit transactions, except to the extent that those laws are inconsistent with the provisions of this subchapter and then only to the extent of the inconsistency." Here, there is no inconsistency. FCC merely promised in its contract with cardholders to do what TILA requires--to state the true date by which payment must be made to avoid finance charges. Nor is there anything in TILA which permits FCC to knowingly make a misrepresentation of a material fact upon which it knew petitioners would and did rely to their detriment.[6] Further, TILA provides in §1610 (d): "Except as specified in sections 1635, 1640, and 1666e..., this subchapter and the regulations issued thereunder do not affect the validity or enforceability of any contract or obligation under State or Federal law."

The Appellate Court's abdication of States' rights under TILA is without warrant or precedent and invites this Court's interdiction.

II. The Decision Below Conflicts With Established Principles of This Court As To Preemption And With Other Courts' Specific Holdings That TILA Does Not Preempt State Based Claims.

In finding that common law claims for breach of contract and fraud are preempted by TILA, the Illinois Appellate Court is at odds with virtually all of this Court's rules on preemption. (1) Since States are independent sovereigns in

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[6] Moreover, under §1610 (a)(1), *supra,* p.3, Congress placed the initial burden of finding any inconsistency on the Federal Reserve Board, not the courts; and FCC made no effort to ask the Board to make such a finding.

our federal system, this Court has "long presumed that Congress does not cavalierly pre-empt state-law causes of action." *Medtronic, Inc. v. Lohr,* 116 S. Ct. 2240, 2250 (1996). (2) The initial assumption is that the States' historic police powers are not to be superseded unless that is Congress' clear and manifest intent. *Cipollone, supra*; *Hawaiian Airlines, Inc. v. Norris,* 512 U.S. __, 129 L.Ed.2d 203, 211, 114 S.Ct. 2239; *Hillsborough County v. Automated Medical Laboratories, Inc.* 471 U.S. 707, 715-16, 105 S.Ct.2371, 2376 (1985). (3) The "purpose of Congress is the ultimate touchstone" in every preemption case. *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103, 84 S.Ct. 219, 222 (1963); *Gade v. National Solid Wastes Management Assoc.*, 505 U.S. 88, 96, 112 S.Ct. 2374, 2381-82 (1992); *Malone v. White Motor Corp.*, 435 U.S. 497, 504, 98 S.Ct. 1185, 1190 (1978). (4) To ascertain Congress' intent, the inquiry necessarily begins with an analysis of the statutory language. *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.,* 514 U.S. __, 115 S.Ct.1671, 1677 (1995).[7]

The decision below not only conflicts with all of this Court's teachings on preemption generally, but also is contrary to decisions of other courts specifically holding that state-based claims for breach of contract and tort are not preempted by TILA. *Walker v. Commercial Credit Corp.,* 192 B.R. 260, 265-66 (M.D.Ala. 1996) ("TILA does not displace state law claims, nor is there 'any other manifestation that Congress intended

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[7]The Illinois Supreme Court recently recognized the above preemption principles and concluded that this "Court instructs that the analysis should begin with the presumption that Congress did not intend to supplant state law. *Travelers,* 514 U.S. __, 115 S. Ct. at 1676...." *Scholtens v. Schneider*, 173 Ill.2d 375, 671 N.E.2d 657, 660 (1996). However, neither the Illinois Appellate or Supreme Court considered or applied them in the case at bar.

preemption'"); *Heastie v. Community Bank of Greater Peoria*, 690 F.Supp.716, 720-21 (N.D.Ill. 1988) (Illinois Consumer Fraud Act not preempted by TILA; the former act promotes the latter's goal of "the informed use of credit"); *McCrae v. Commercial Credit Corp.*, 892 F. Supp. 1385, 1386-87 (M.D.Ala. 1995) ("'[a]bsent in the [TILA] statute are any provisions which purport to demonstrate the preemption of state causes of action.'"); *General Electric Capital Auto Lease, Inc. v. Mires*, 788 F.Supp. 948, 950 (E.D.Mich. 1992) ("There is no indication that the TILA carries the extraordinary congressional mandate for preemption of state law."); *Peoples Trust & Savings Bank v. Humphrey*, 451 N.E.2d 1104, 1110-11 (Ind.App. 1983) (TILA is not an exclusive remedy and does not bar common law fraud action); *Public Finance Corp. v. Riddle*, 83 Ill.App.3d 417, 403 N.E.2d 1316, 1320 (1980) ("TILA ... show[s] an intent to create parallel remedies, federal and state ... [A] contract can violate both state law and TILA..."). *See also, American Express Travel Related Services Company, Inc. v. Web, Inc.*, 261 Ga. 480, 405 S.E.2d 652, 654 (1991) (State law not preempted by TILA).

These conflicts should be resolved by this Court's issuance of a writ of certiorari and an opinion (or summary reversal) declaring that nothing in TILA's language or purpose permits preemption of state-based claims which, like those here, are consistent with TILA.

III. The Decision Below Also Rests On A Patently Erroneous Federal Case (*Price-Fed*), Which Permits Credit Card Issuers To Deceive Tens of Millions of Credit Cardholders Into Making Early Payments of Tens of Billions of Dollars Annually, And Which Should Now Be Overruled.

Petitioners unsuccessfully sought a writ of certiorari in *Price-Fed, supra*, 114 S.Ct. 695. Denial of that petition, of course, did not mean that this Court agreed with *Price-Fed*, but did permit the Illinois Appellate Court to rely upon it. Thus one erroneous decision has begotten another; and it is time, petitioners respectfully submit, to overrule both, albeit for different reasons.[8]

Price-Fed is at war with the plain language and purpose of TILA. Its interpretation of TILA promotes deception rather than truthful disclosure. It also permits other credit card issuers to engage in similar deceptive practices to the detriment of their card holders.[9]

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[8] Even if *Price-Fed* were correctly decided, the erroneous decision below, *Price-Ill*, should not be permitted to stand in conflict with this Court's preemption precepts.

[9] Although not disclosed in the record below, it appears that other bank creditcard issuers are engaging in deceptive practices similar to FCC's. Petitioners are informed, e.g., that Citibank engages in the same practice as FCC with this twist: when cardholders pay on time, it cuts the time between billing and payment due dates from the promised 25 days to 20 days without disclosing it is doing so. If a cardholder notices the change and complains, Citibank shifts back to the 25 day grace period and does not thereafter revert to the 20 day period. In 1996 Citibank had the largest credit card portfolio with an annual credit volume of $47 billion. Based on the documents referred to in fn. 1, *supra*, Citibank cardholders, on average, are being deprived of the use of $18.8 billion of their own money for 60 days

(continued...)

Congress has declared that:

> it is the purpose of [TILA] to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices. (15 U.S.C. §1601(a)).

This Court has applied TILA to effectuate that purpose when creditors failed to disclose accurately what the Act requires. *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 363-68, 92 S.Ct. 1652, 1657-60 (1973). Being remedial, TILA is construed liberally in favor of the consumer. *Fairley v. Turan Imports, Inc.*, 65 F. 3d 475, 479-80 (CA 5, 1995); *Cody v. Community Loan Corp. of Richmond County*, 606 F.2d 499, 505, *reh'g denied,* 608 F.2d 1373 (CA 5, 1979), *cert. denied,* 446 U.S. 988 (1980); *Littlefield v. Walt Flanagan & Co.*, 498 F.2d 1133, 1136 (CA 10, 1974); *N.C. Freed Co., Inc. v. Board of Governors of Fed. Res. Sys.* 473 F.2d 1210, 1214 (CA 2, 1973); *American Express Travel Related Services Company, Inc. v. Web, Inc.*, 261 Ga. 480, 405 S.E. 2d 652, 654 (1991).

Price-Fed sanctioned FCC's false and deceptive practice, notwithstanding the clear legislative mandate of accurate disclosure, only by accepting as true FCC's admittedly fictional or "shadow" grace period. Thus, the court stated:

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[9](...continued)
each year. Citibank's practices, and its consequences, are sanctioned by the Seventh Circuit's misinterpretation of TILA in *Price-Fed.*

> FCC's practice clearly complies with [§1637(b)(9)]. FCC extends a 20-day grace period to customers, such as plaintiffs, who routinely pay their bills without incurring a finance charge. There is no dispute that the existence and duration of this grace period is fully disclosed on the billing statement of the affected customers. (4 F.3d at 474)

However, based upon the court's own opinion, the conclusion that FCC offers a 20-day grace period is plainly erroneous as a matter of law and fact. FCC does not "extend [ ] a 20-day grace period" and has conceded that 20 days is not the time within which payment must be made to avoid finance charges. Rather, as *Price-Fed* itself states, FCC retains "an actual grace period of 25 days." (4 F.3d at 473). This was confirmed by the Illinois Appellate Court in *Price-Ill* (673 N.E.2d at 1068; App.2): "FCC does not assess finance charges against any customer who pays his balance within 25 days after the billing date." Therefore, it cannot be true, as *Price-Fed* states, that "FCC has satisfied its obligation to disclose the `period . . . within which[ ] payment must be received [sic] to avoid additional finance charges.'" (4 F.3d at 474). Because the "grace period" disclosed is 20 days and the actual grace period is 25 days, FCC has violated TILA and *Price-Fed* erred beyond doubt.[10]

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[10] *Price-Fed* also sought to support its acceptance of FCC's deceptive practice by asserting that FCC "could, consistent with the agreement, assess such a [finance] charge as early as the twenty-first day after the billing date." (4 F.3d at 474) (emphasis added). Regardless of whether FCC could do so, the undisputed fact is that it does not. Its actual grace period remains at 25 days. (4 F.3d at 473).

Price-Fed also misconstrued the second clause of §1637(b)(9). (4 F.3d at 474-5). That clause, by its own terms, applies only when the issuer has truthfully stated the actual payment due date. The phrase "after such date" in the second clause refers to the date truthfully revealed in accordance with the first clause, i.e., the date by which payment must be made to avoid finance charges. The second clause does not excuse stating the actual payment due date in the first instance but merely allows a creditor to waive finance charges actually incurred on a late payment. That clause is not a license to state a false due date or pretend to "waive" finance charges that were not incurred. The "except clause," by its own terms, applies only when payment is received "**after**" the due date. In the case at bar the payments are received **before** the actual due date.[11] *Price-Fed*'s interpretation of the second clause reads the main clause out of the Act, contrary to the standard rule of construction that an "exception" clause does not normally "swallow the rule," *Walker v. Rogers*, 272 Ill.App.3d 86, 650 N.E.2d 272, 275-6 (1995).

Two subsequent decisions of the Seventh Circuit appear to be in conflict with *Price-Fed.* In *Highsmith v. Chrysler Credit Corp.,* 18 F.3d 434, 439, n.3 (CA 7, 1994), which sought to distinguish *Price-Fed*, the Court of Appeals struck down as deceptive under the Consumer Leasing Act (which is part of the same statute as TILA), as well as the

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[11] The "except clause" was designed to deal with the inefficiencies that developed over the years in the delivery of the U.S. mail and the late payments that resulted. If FCC advised cardholders in monthly statements to be sure to mail their payments five days before the actual due date while disclosing that the actual payment due date was 25 days, FCC would be in compliance with the disclosure laws and still could avail itself of the "except clause" in TILA whenever it deemed necessary to assuage cardholders whose mail delayed payments were received late.

Illinois Consumer Fraud Statute, a forbearance policy strikingly similar to FCC's "shadow grace forbearance" policy. The court said (*id.* at 440; emphasis added):

> Chrysler, and all other lessors, will always have the ability to forbear from imposing charges or to reduce charges on a case-by-case basis if they feel that any particular lessee labors under a financial hardship. **What they may not do, however, is to maintain a practice of always calculating the early termination charge according to a certain formula while disclosing only a portion of that formula in the lease.**

FCC goes beyond exactly what *Highsmith* forbids: it **always** calculates or allows a "grace period" of **25** days while **always** disclosing (falsely) that it is only **20** days.

In a more recent decision, the Seventh Circuit also held under the Consumer Leasing Act, which it said was a law "similar" to TILA, *Channell v. Citicorp Nat. Services, Inc.*, 89 F.3d 379, 383 (CA 7, 1996), that it was illegal for Citicorp to disclose that it would use of the Rule of 78's when in fact it used "the actuarial method (an exact calculation) to determine unearned interest..." Following *Highsmith*, the court held: "a disclosure is deficient if the lessor does something else, **even if that something else is more favorable to the lessee. Lessors must disclose what they do in fact.**" (89 F.3d at 383; emphasis added.)

The clarity of *Price-Fed*'s error is matched by the breadth and severity of its impact. See footnotes 1 and 9, *supra*. Further, that error is compounded by the result in *Price-Ill* which uses *Price-Fed* as a fulcrum to find FCC in compliance

with the Credit Card Act and to immunize FCC by preemption from its breach of contract and common law fraud, all in derogation of historical States' rights to protect its citizens.

Conclusion

Because the erroneous decision below strips fundamental power from states to protect their citizens and will have a profound nationwide effect on tens of millions of cardholders who are being deprived of the use of billions of dollars, it is respectfully requested that this Court grant a writ of certiorari and reverse the judgment below and, if it deems appropriate, also overrule *Price v. FCC National Bank*, 4 F.3d 472 (CA 7, 1993). Petitioners further suggest that the decision below is in such conflict with this Court's preemption principles as to warrant summary reversal in light of the cases cited in Part II, *supra.*

Respectfully submitted,

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Appendix

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT, FIFTH DIVISION

No. 1-95-4210
George K. Price and Harry L. Schuman,

Plaintiffs-Appellants,

v.

FCC National Bank,

Defendant-Appellee.

Appeal from the Circuit Court of Cook County.
Honorable Ellis E. Reid, Judge Presiding.

Decided November 22, 1996

PRESIDING JUSTICE McNULTY delivered the opinion of the court:

Plaintiffs George K. Price and Harry Schuman appeal from the dismissal of their action alleging violation of the Illinois Credit Card Issuance Act (815 ILCS 140/6 (West 1994)), breach of contract and common law fraud against FCC National Bank (FCC). We affirm.

FCC offers Visa and Mastercard bank credit cards under the name "First Card." Plaintiffs maintain bank credit cards with FCC. The privileges and obligations of holding a First Card are set forth in the cardholder agreement (agreement). Prior to April 1, 1991, the agreement provided that all cardholders had a "grace period" of 25 days after receipt of a billing statement to pay an outstanding balance without incurring a finance charge. On April 1, 1991, the agreement was amended to provide that a finance charge would accrue unless payment was made on or before the "payment due date" printed on the billing statement. The grace period was the time between the billing date and the payment due date.

FCC breaks its cardholders into two groups: cardholders who have paid their previous month's balance in full, which is the group plaintiffs seek to represent; and (2) cardholders who have not paid the total amount due on their bill. For those in category one, previous month full payers, FCC inserts a Payment due date on their next monthly billing statement that is 20 days from the statements billing date. However, FCC does not assess finance charges against any customer who pays his balance within 25 days after the billing date. For those in category two, those who have run a balance on their previous month's bill, FCC sets due dates on these cardholders' statements that are 25 days from the billing date, but because these cardholders have not paid their previous month's balance in full, they are assessed finance charges until that balance is paid in full.

Plaintiffs originally filed suit on March 30, 1992, in federal court, claiming that FCC's practice of inserting a payment due date of 20 days after the billing date but not charging finance charges until 25 days after the billing date violated the Truth In Lending Act. 15 U.S.C. §§1601 through 1693 (1988). Plaintiffs' suit also alleged that this practice

violated the Illinois Credit Card Issuance Act (815 ILCS 140/6 (West 1994), was a breach of the Illinois Consumer Fraud and Deceptive Business Practices Act (Consumer Fraud Act) (815 ILCS 505/1 (West 1994)), and a breach of contract. Plaintiffs also sought class certification. The district court dismissed plaintiffs' complaint, finding that FCC's grace period was authorized by the disclosure requirements of the Truth in Lending Act. *Price v. FCC National Bank*, 92 C 2164 (N.D.Ill. 1992). The court declined to exercise jurisdiction over plaintiffs' state claims. The seventh circuit affirmed. *Price v. FCC National Bank*, 4 F.3d 472 (7th Cir. 1993).

Plaintiffs then brought suit in state court alleging violation of the Illinois Credit Card Issuance Act, breach of contract and common law fraud. Defendant moved to dismiss plaintiffs' complaint pursuant to section 2-615 of the Code of Civil Procedure. 735 ILCS 5/2-615 (West 1994). The trial court granted defendant's motion to dismiss, finding that plaintiffs' claim alleging violation of the Credit Card Issuance Act failed to state a claim since the agreement provides that Delaware law would apply, and plaintiffs' breach of contract and fraud claims fail to state claims since plaintiffs have not been damaged. Plaintiffs appeal.

Plaintiffs' complaint alleges the defendant violated section 6 of the Credit Card Issuance Act, which states, in pertinent part:

> "§6. Disclosure to applicants.
>
> (a) Except as provided in Section 25 of the Retail Installment Sales Act, relating to sellers or holders under a retail charge agreement and in subsection (c), a credit card issuer shall disclose, either on an application for a credit

> card or on literature accompanying the application, on or with any credit card account solicitation, and on each periodic billing statement mailed to a card holder, the following:
>
> * * *
>
> (3) the grace period, which is defined as the period within which any credit extended under such credit plan must be repaid to avoid incurring an interest charge represented in terms of an annual percentage rate of interest, and if no such period is offered such fact shall be clearly stated." 815 ILCS 140/6 (West 1994).

Plaintiffs contend that defendant violated section 6 of the Credit Card Issuance Act, as well as committed common law fraud and breach of contract, when it represented, by means of a false payment due date, a period that is shorter than the period within which any credit extended must be repaid to avoid incurring an interest charge.

Credit card disclosure requirements are also addressed in the federal Truth in Lending Act, which requires credit card issuers to disclose in each periodic billing statement:

> "[t]he day by which or the period (if any) within which payment must be made to avoid additional finance charges, except that the creditor may, at his election and without disclosure, impose no such additional finance charge if payment is received after such date or expiration of such period." 15 U.S.C. §1637(b)(9) (1988).

Defendant urges us to uphold the trial court's dismissal of plaintiffs' action on the basis that the federal court has

determined that defendant has complied with the federal Truth in Lending Act and, according to defendant, compliance with the Truth in Lending Act is complete compliance with Illinois law. Defendant claims that the court in *Lanier v. Associates Finance, Inc.*, 114 Ill.2d 1, 499 N.E.2d 440 (1986), determined that compliance with the Truth in Lending Act is compliance with the Illinois Credit Card Issuance Act. The court in *Lanier* actually determined that compliance with the federal Truth In Lending Act is a defense to liability under the Illinois Consumer Fraud Act. The court also noted that the disclosure requirements of certain Illinois consumer credit statutes are met by compliance with the federal Truth in Lending Act. The consumer credit statutes referred to by the court were the Consumer Installment Loan Act (Ill. Rev. Stat. 1981, ch. 17, par. 5420), "An Act in relation to the *** rates of interest" (Ill. Rev. Stat. 1981, ch. 17, par. 5410), the Retail Installment Sales Act (Ill. Rev. Stat. 1981, ch. 121 1/2, par. 505), and the Motor Vehicle Retail Installment Sales Act (Ill. Rev. Stat. 1981, ch. 121 1/2 par. 565). Each of these statutes specifically states that compliance with the Truth in Lending Act is compliance with the Illinois statute. The court in *Lanier* stated that "we perceive in the disclosure provisions of Illinois' consumer credit statutes a consistent policy against extending disclosure requirements under Illinois law beyond those mandated by the Truth in Lending Act, in situations where both the Act and the Illinois statutes apply." *Lanier*, 114 Ill.2d at 17.

Section 10b(1) of the Consumer Fraud Act provides that the Consumer Fraud Act does not apply to "[a]ctions or transactions specifically authorized by laws administered by any regulatory body or officer acting under statutory authority of this State or the United States." 815 ILCS 505/10b (West 1994). The *Lanier* court determined that this section of the Consumer Fraud Act also provides that compliance with the Truth in Lending Act is compliance with the Illinois Consumer

Fraud Act. *Lanier* did not, however, address whether compliance with the federal Truth in Lending Act is compliance with the statute at issue here, the Illinois Credit Card Issuance Act.

We do address this issue and find that compliance with the federal Truth in Lending Act is indeed compliance with the Illinois Credit Card Issuance Act. When plaintiffs here filed their original complaint in 1993, the Illinois Credit Card Issuance Act provided in pertinent part:

> "If a credit card issuer, as required pursuant to federal law, makes disclosures of all information required to be disclosed under subsection (a) of Section 6 of this Act in connection with *** periodic billing statements, the credit card issuer shall be deemed to have complied with the requirements of subsection (a) of Section 6 of this Act." 815 ILCS 140/9 (West 1992).

In 1994, prior to the filing of plaintiffs' amended complaint, the Illinois Credit Card Issuance Act had been amended to state in pertinent part:

> "A credit card issuer who complies with or is exempt from the applicable disclosure requirements of the Truth in Lending Act and the regulations promulgated under that Act shall be deemed to be in compliance with or exempt from all provisions of subsection (a) of Section 6 of this Act." 815 ILCS 140/9(c) (West 1994).

The parties disagree as to whether the former statute or the amended statute is applicable to this case. We find it unnecessary to determine whether one statute or the other applies, since the amended statute did not change the law but merely clarified the law. See *Friedman v. Krupp Corp.*, 282 Ill.App.3d 436 (1996); *Hyatt Corp. v. Sweet*, 230 Ill.App.3d 423, 594 N.E.2d 1243 (1992). The former statute provided that a credit card issuer that makes the disclosures required by federal law complies with the disclosure requirements of section 6 of the credit card act. The amended version specifically states that compliance with the Truth in Lending Act is compliance with the disclosure requirements of section 6 the Credit Card Issuance Act. Thus, regardless of which statute applies, the fact that defendant's disclosure of the grace period complies with the Truth in Lending Act automatically means defendant's disclosure is in compliance with the Illinois Credit Card Issuance Act. Plaintiffs' claim based on the Credit Card Issuance Act was therefore properly dismissed.

We also find that because defendant has complied with the federal Truth in Lending Act, plaintiffs cannot state a claim for either common law fraud or breach of contract. The court in *Lanier* found that a disclosure in compliance with the Truth In Lending Act could not state a claim for common law fraud. The court reasoned that to hold otherwise would put a creditor in the anomalous position of being guilty of common law misrepresentation by specifically complying with the mandates of the federal Truth In Lending Act. *Lanier*, 114 Ill.2d at 10-11. We reach the same conclusion here and also hold that, because defendant complies with the federal law, it could not have breached its contract with plaintiffs.

Accordingly because defendant's disclosure of the grace period complied with the federal Truth in Lending Act, and compliance with that act is compliance with Illinois law,

plaintiffs' complaint was properly dismissed for failure to state a claim.

Affirmed.

COUSINS and HOURIHANE, JJ., concur.

Supreme Court, U. S.
FILED
SEP 27 1997
CLERK

No. 97-358

In The

Supreme Court of the United States

October Term, 1996

GEORGE K. PRICE and HARRY L. SCHUMAN,

Petitioners,

v.

FCC NATIONAL BANK,

Respondent.

On Petition For A Writ Of Certiorari To The Illinois Appellate Court

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED[1]

Whether this Court has jurisdiction, pursuant to 28 U.S.C. § 1257(a) (1994), to grant a petition for a writ of certiorari from a state court decision dismissing state law claims according to state law principles and, if so, did the Illinois Appellate Court misconstrue Illinois common law by holding that the way in which a credit card issuer disclosed its cardholders' payment due dates on their monthly billing statements did not constitute either a breach of contract or fraud under Illinois' common law.

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[1] Pursuant to Supreme Court Rule 29.6, Respondent, FCC National Bank ("FCC"), states that it is a wholly-owned subsidiary of First Chicago NBD Corporation.

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STATEMENT OF THE CASE

FCC issues First Card Visa and Mastercard credit cards. Pursuant to the Agreement between FCC and its cardholders (the "Agreement"), payments are due on or before the Payment Due Date shown on the billing statement sent to the cardholder monthly. If the bill is not paid in full on or before the Payment Due Date, according to the Agreement, finance charges are charged beginning on the date the purchases were made. If the bill is paid in full on or before the Payment Due Date, the Agreement provides that no finance charges are charged.

The Payment Due Date on each billing statement varies from 20 to 25 days from the billing date. The Payment Due Date for cardholders who have not paid their bills in full ("Partial Paying Cardholders") is 25 days from the billing date; the Payment Due Date for cardholders who have paid their bills in full ("Full Paying Cardholders") is 20 days from the billing date. For the Full Paying Cardholder, finance charges are assessed only if payment is not received within 25 days; in other words, there is a five-day shadow grace period for Full Paying Cardholders.

This shadow grace period is expressly permitted by Section 127(b)(9) of the Truth in Lending Act ("TILA"), 15 U.S.C. § 1637(b)(9), which requires a creditor to provide its cardholders who have outstanding balances with monthly billing statements informing them of:

> The day by which or the period (if any) within which, payment must be made to avoid additional finance charges, except that the creditor may, at his election and without disclosure,

> impose no such additional finance charge if payment is received after such date or the termination of such period.

The shadow grace period protects Full Paying Cardholders, those who want to avoid finance charges, from their own inadvertence in mailing their payments a few days late or the vagaries of mail delivery. The practice also greatly reduces cardholder complaints and increases cardholder satisfaction, while simultaneously encouraging cardholders to make sure their payments are received timely. For Partial Paying Cardholders, the number of days used in calculating the Payment Due Date does not matter because interest is charged from the date of their purchases.[2]

In 1992, Petitioners brought suit, in federal court, claiming that FCC's shadow grace period violated TILA, as well as Illinois statutory and common law. The TILA claim was concluded when the United States Court of Appeals for the Seventh Circuit, affirming the district court, held that FCC's shadow grace period complied with TILA, and this Court declined to review that decision. *See Price v. FCC National Bank*, 4 F.3d 472 (7th Cir. 1993), *cert. denied*, 510 U.S. 1046 (1994).

Thereafter, Petitioners refiled their state law claims, which had been dismissed for want of jurisdiction after

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[2] Contrary to Petitioners' assertion, Petition For A Writ Of Certiorari ("Petition") at 10, FCC does in fact assess finance charges against certain cardholders who pay their balances in full within 25 days. Partial Paying Cardholders who then pay their balance in full are assessed finance charges until their accounts are paid in full.

the dismissal of their TILA claim, in an Illinois state court. There they claimed that FCC's shadow grace period policy violated the Illinois Credit Card Act, 815 Ill. Comp. Stat. 140/6 (West 1994), and constituted common law fraud and common law breach of contract. The Illinois Appellate Court affirmed the Illinois trial court's dismissal of all three counts for failure to state a claim under Illinois law. Petitioners do not seek review of the Illinois Appellate Court's determination that FCC's shadow grace period policy complies with the Illinois Credit Card Act. *See* Petition at 10 n.5. Petitioners, however, do challenge the Illinois Appellate Court's holding that FCC's shadow grace period policy did not breach the Agreement and did not constitute fraud.

REASONS FOR DENYING THE WRIT

This Court should deny the Petition because: (1) this Court does not have jurisdiction to hear it; and (2) the decision of the Illinois Appellate Court, from which Petitioners seek to appeal, was correct and does not conflict with the decision of any other tribunal.

I. This Court Lacks Jurisdiction.

This Court should deny the Petition because it does not have jurisdiction over it. This case involves the dismissal of Petitioners' state law claims by a state appellate court applying state law principles. 28 U.S.C. § 1257(a)

(1994), Petitioners' purported jurisdictional basis, *see* Petition at 2, requires that some federal interest be at issue to confer jurisdiction:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Petitioners try to create that federal interest in one of two ways: (1) by mischaracterizing the Illinois Appellate Court decision as holding that FCC's compliance with the disclosure requirements of TILA preempted Petitioners' state common law claims in violation of the Constitution's Supremacy Clause and this Court's precedents on preemption, *see* Petition at 11-14; and (2) by contending that the Illinois Appellate Court's reliance on the federal appellate court's holding in *Price* that FCC's disclosures complied with TILA confers jurisdiction in this Court not only to review the Illinois Appellate Court decision but also to review the Seventh Circuit's decision in *Price*, *see* Petition at 15-20, which this Court has already once declined to review.

None of Petitioners' arguments creates jurisdiction under 28 U.S.C. § 1257(a).

A. There Is No Violation Of The Supremacy Clause Or This Court's Precedents On Preemption.

To create a federal interest, Petitioners first mischaracterize the Appellate Court as holding that FCC's compliance with TILA's disclosure requirements "superseded state common law actions for breach of contract and fraud." Petition at 11. Petitioners then claim that this holding: (1) violates the Supremacy Clause, U.S. Const. art. VI, cl. 2, because it sanctions an unwarranted and unprecedented federal incursion into the historical powers of the States to protect their citizens' rights; and (2) misapplies this Court's precedents on preemption. *See id.* at 11-14.

In fact, the Illinois Appellate Court never held that TILA superseded any of Petitioners' state law claims and never applied the preemption doctrine. Indeed, it neither discusses, nor even mentions, either issue. Instead, the Illinois Appellate Court simply held that since FCC's disclosures complied with TILA they satisfied Illinois law because, as a matter of public policy, Illinois does not impose greater disclosure requirements upon credit card issuers than those contained in TILA. *See Price v. FCC National Bank*, 673 N.E.2d 1068, 1070-1071 (Ill. App. 1996), *appeal denied*, 679 N.E.2d 385 (Ill. 1997) ("Accordingly because defendants' disclosure of the grace period complied with the federal Truth In Lending Act, and compliance with that act is compliance with Illinois law, plaintiffs' complaint was properly dismissed for failure to state a claim.") In reaching this conclusion, the Illinois Appellate Court was merely following the lead of the Illinois Supreme Court, which had earlier come to the

same conclusion in a similar context. *See Lanier v. Associates Finance, Inc.*, 499 N.E.2d 440, 444-447 (1986) (dismissing state statutory and common law claims against a credit issuer who had complied with TILA based on a state policy against extending Illinois' disclosure requirements beyond those mandated by TILA).

Illinois' decision to deem compliance with TILA as satisfying its own credit disclosure requirements is voluntary. Consequently, the Illinois Appellate Court decision dismissing Petitioners' state law claims does not implicate the Supremacy Clause, historical notions of States' rights, the preemption doctrine, or any other federal law or doctrine. Since 28 U.S.C. § 1257(a) requires that some federal interest be involved to confer jurisdiction to hear the Petition, and since none is involved here, this Court should deny the Petition.

B. That The Illinois Appellate Court Relied On A Federal Appellate Court Decision In Reaching Its Decision Does Not Confer Jurisdiction.

Petitioners also ask this Court to grant their Petition as a way to review the Seventh Circuit's decision in *Price*, which Petitioners contend was erroneously decided. *See* Petition at 15. As will be demonstrated, *see supra* at 8-12, the Seventh Circuit's decision was correct. However, as a jurisdictional matter, that is irrelevant because, right or wrong, Petitioners cannot use the Illinois Appellate Court's reliance on the Seventh Circuit's decision to establish jurisdiction to hear the Petition.

As Petitioners concede, when this Court denied their petition for a writ of certiorari to review the Seventh

Circuit's decision, that decision became final and permitted the Illinois Appellate Court to rely on it. *See* Petition at 15. However, nothing in the Seventh Circuit's decision compelled the Illinois Appellate Court to hold that compliance with TILA satisfied Illinois' disclosure requirements. To the contrary, once the Seventh Circuit dismissed Petitioners' TILA claim, it dismissed their state law claims for lack of jurisdiction. *See Price*, 4 F.3d at 475. Thus, the Illinois Appellate Court was always free to determine whether Petitioners' common law claims stated causes of action under state law.

Nor does the fact that, in reaching its decision, the Illinois Appellate Court accepted the Seventh Circuit's determination that FCC's disclosures complied with TILA create jurisdiction in this Court to review either the Illinois Appellate Court decision or the Seventh Circuit decision. The Illinois Supreme Court has held that Illinois' consumer credit disclosures are the same as those under TILA, *see Lanier*, 499 N.E.2d at 444-447, and so in following the Seventh Circuit decision, the Illinois Appellate Court was merely complying with Illinois law. It is well settled law that when a state court is merely following state law by giving preclusive effect to a federal court decision, the state court does not create a federal interest so as to confer jurisdiction under 28 U.S.C. § 1257(a). *See Fox Film Corp. v. Muller*, 296 U.S. 207 (1935) (holding that this Court lacked jurisdiction to entertain appeal from a state court finding that an earlier federal action had determined that a provision in a contract violated federal antitrust laws because the state court decision was based on state law concepts of estoppel and the application of

estoppel ruling was independent of the validity of the prior federal decree).

Petitioners' attempt to use this case as a method to seek review of the Seventh Circuit decision is unwarranted jurisdictionally and would create poor precedent besides. Petitioners had their bite at the apple when they sought review of the Seventh Circuit decision directly. They are not entitled to another one. This Court should deny the Petition.

II. The Illinois Appellate Court Decision Was Correctly Decided.

Because the Illinois Appellate Court decision does not implicate, much less violate, the Supremacy Clause or this Court's precedents on preemption, *see infra* at 5-6, there is no need to grant the Petition to review Petitioners' argument that it does. Moreover, this Court should not consider Petitioner's other reason for review, that the Seventh Circuit decision was wrongly decided, because this Court has previously refused to consider this question, *see Price*, 510 U.S. 1046 (1994), and nothing has occurred since then that should change that result, such as a decision contrary to the Seventh Circuit decision by another tribunal. *See* Sup. Ct. R. 10 (Considerations Governing Review On Certiorari). But even if this Court were inclined to reconsider this question, it should still not grant the Petition because: (1) the Seventh Circuit decision is correct; and (2) denying the Petition will have little effect and will not harm consumers.

A. The Truth In Lending Act And Regulation Z Permit FCC's Shadow Grace Period Policy.

At issue in the Seventh Circuit decision was the proper interpretation of Section 127(b)(9) of TILA and Section 226.7(j) of Regulation Z, 12 C.F.R. 226.7(j) (1995), promulgated by TILA's regulators, the Federal Reserve Board (the "Board"). FCC interpreted TILA and Regulation Z as permitting an undisclosed five-day grace period as a matter of business practice. Petitioners interpreted it as mandating disclosure of this five-day grace period. FCC's interpretation was, and is, correct.

In relevant part, Section 127(b)(9) of TILA requires a creditor to reveal in its periodic billing statements:

> The day by which or the period (if any) within which payment must be made to avoid additional finance charges, except that the creditor may, at his election and without disclosure, impose no such additional finance charge if payment is received after such date or the termination of such period.

Section 127(b)(9) is clear. It sets forth a general rule in the first clause and an exception to the general rule in the second clause. The general rule requires a credit card issuer to reveal in its periodic billing statements the contractual date on which its cardholders' payments are due. The exception allows the credit card issuer, without disclosure, to forebear from imposing contractually permissible finance charges if its cardholders' payments are received after their contractual due dates.

FCC's challenged practice complies with Section 127(b)(9). FCC informs cardholders who have previously

timely paid their bills in full, the Full Paying Cardholders, that they have 20 days within which to pay their bills. Thereafter, FCC unilaterally, and without disclosure, forbears from actually imposing contractually permissible interest charges unless their payments are received more than five days after their due dates. For the same reasons, it also complies with Regulation Z which provides in pertinent part: "a creditor may, at its option and without disclosure, impose no finance charge when payment is received after the time period's expiration." 12 C.F.R. § 226.7(j).

To reach their contrary construction, Petitioners initially posit that the general rule in the first clause of Section 127(b)(9) does not require a credit card issuer to reveal in its periodic billing statements the date on which its cardholders' payments are contractually due. Rather, Petitioners argue, it requires the issuer to reveal the date on which it will actually impose finance charges, taking into account all undisclosed and internal forbearance policies maintained by the issuer. *See* Petition at 17. Having construed the first clause so illogically, Petitioners then flounder in their attempt to construe the exception in the second clause of Section 127(b)(9) in a way that makes any sense at all. The construction offered by them is that the second clause only "allows a creditor to waive finance charges actually incurred on a late payment." *Id.* at 18. Petitioners' construction cannot be correct because under it the exception to the general rule ceases to exist and it is at odds with the plain language of Section 127(b)(9).

As Petitioners concede, under their construction a credit card issuer may only decide to forbear from imposing contractually permissible interest after its cardholders' Payment Due Dates have passed. *See id.* at 18. Yet Section 127(b)(9) states that the "creditor may, at his election and without disclosure, impose no additional finance charge[.]" Impose is the present active form of the verb. Any decision *not to impose* finance charges must necessarily be made prior to the imposition of those finance charges. Petitioners' construction, which requires the reversal of a finance charge previously *imposed*, cannot be correct.

Moreover, under Petitioners' construction, there is never a circumstance under which the card issuer can decide not to impose a finance charge without disclosing its decision. Section 127(b)(9) allows a credit card issuer not to impose finance charges *without disclosure*. If a credit card issuer may only "waive" previously imposed finance charges in response to cardholder complaints, it is impossible to do so without disclosure. Obviously, the "waiver" must be disclosed to the cardholder. If the card issuer has to tell the cardholder finance charges will be assessed after a certain date, then the card issuer cannot make an undisclosed decision not to impose a finance charge after that date.

Section 127(b)(9) contains a general rule and an exception. By containing an exception, Section 127(b)(9) recognizes there will be a situation where disclosure will

not be made. FCC's practice is authorized by TILA. This Court should deny the Petition.[3]

B. Denying The Writ Will Have Little Effect And Will Not Harm Consumers.

Petitioners also argue that the Petition should be granted because the Seventh Circuit's decision in *Price* and the "erroneous decision below . . . will have a profound nationwide effect on tens of millions of cardholders[.]" Petition at 20. Central to Petitioners' thesis is that the decision below represents a new interpretation of TILA. What Petitioners ignore is that the practice complained of is the industry standard and has been, with the approval of the Board, since at least 1971.

In 1971, Section 127(b)(9) did not contain the exception in the second clause. Instead, it simply contained the general rule in the first clause which required the creditor

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[3] Petitioners also argue that subsequent Seventh Circuit decisions conflict with the Seventh Circuit's decision in *Price*. Petition at 18-19 (citing *Highsmith v. Chrysler Credit Corp.*, 18 F.3d 434, 439 n.3 (7th Cir. 1994), and *Channell v. Citicorp Nat. Services, Inc.*, 89 F.3d 379, 383 (7th Cir. 1996)). This argument is makeweight. Neither of those cases involved credit card issuers, and so the disclosure scheme contained in 15 U.S.C. § 1637(b)(9) was not applicable in either case. Indeed, the Seventh Circuit specifically commented on this when it distinguished its holding in *Price* from that in *Highsmith*. *Highsmith*, 18 F.3d at 439 n.3. To distinguish a case means to differentiate it, not overrule it. *See Atencio v. Espanola Housing Authority*, 568 P.2d 1245, 1250 (N.M. Ct. App. 1977) ("Distinguish means to point out an essential difference; to prove a case, cited as applicable, as inapplicable.") The Seventh Circuit's decision in *Price* is as good law now as the day it was decided.

to reveal: "the date by which, or the period (if any) within which, payment must be made to avoid additional finance charges." In response to a letter asking for clarification regarding whether Section 127(b)(9) permitted the then widespread industry practice whereby credit card issuers granted their cardholders an undisclosed period within which to pay credit card bills, the Board, in permitting the practice, responded:

> In your letter of April 19, 1971, you inquired whether it would be permissible in an open end credit plan, to disclose under § 226.7(b)(9) of Regulation Z the fact that payment in full must be made within 25 days in order to avoid finance charges, when, in reality, the creditor allows a full month from the close of the billing cycle before imposing finance charges.
>
> We believe that it is permissible under Regulation Z to allow an additional grace period beyond the date specified in which to receive payments before a finance charge is assessed. Consequently, the plan you propose would be permissible.

Excerpt from Board Interpretive Letter No. 475, dated May 10, 1971, by Griffith L. Garwood, Attorney, CCH Consumer Credit Guide, ¶ 30,675.

TILA was amended in 1974. At that time, the exception to the general rule in the second clause was added to Section 127(b)(9). As is required, the Board summarized the amendment in the Federal Register. This summary, which sets forth an example of how Section 127(b)(9) works, says:

> For example, a creditor may disclose that the customer has 25 days in which to pay his account in full to avoid additional finance charges but as a matter of business practice allows [sic] the customer a full 30 days – the beginning of the next billing cycle – to pay the account without the imposition of additional finance charges.

40 Fed. Reg. 1717 (1975). Except for the number of days used, this example is exactly the same as FCC's practice.

For over twenty-six years the practice such as the one engaged in by FCC has been publicly approved by the agency responsible for administering TILA. The decision below, which only affirms that policy, is hardly likely to cause much of a stir.[4]

Should the decision below and the Seventh Circuit decision in *Price* be reversed, cardholders will be disadvantaged. What Petitioners seek to eliminate is FCC's grant of a gratuitous forbearance period. This Court's adoption of Petitioners' interpretation simply means that FCC must eliminate its free forbearance policy and that FCC must charge its cardholders interest if their payments are received as little as a day late, unless a cardholder specifically calls up and complains. As the District Court observed in dismissing Petitioners' claim: "[i]t is hard to fathom what Congress' reasoning would have been for such a policy[.]" *Price v. FCC National Bank*, No.

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[4] The Board's interpretation of Section 127(b)(9) is entitled to great deference. *Udall v. Tallman*, 380 U.S. 1, 16 (1965). Moreover, contemporaneous administrative construction of a statute is persuasive evidence of its meaning. *United States v. Sheffield Board of Commissioners*, 435 U.S. 110, 131 (1978).

92 C 2164, 1992 U.S. Dist. LEXIS 12462 at *5 (N.D. Ill. Aug. 18, 1992). The Petition should be denied.

CONCLUSION

This case simply involves a state court's dismissal of Petitioners' state law causes of action employing state law principles. Consequently, this Court does not have jurisdiction over the Petition. Moreover, even if it did, this Court should not grant the Petition because the decision of the Illinois Appellate Court was correct. All in all, four courts have reviewed Petitioners' claims without a single judge or justice opining that they had any merit whatsoever. Further, this Court has already once declined to review Petitioners' claims, as has the Illinois Supreme Court. The time has come to put an end to Petitioners' misuse of the state and federal court systems. This Court should deny the Petition.

Respectfully submitted,

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No. 97-358

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1997

GEORGE K. PRICE and HARRY L. SCHUMAN,

Petitioners,

v.

FCC NATIONAL BANK,

Respondent.

Petition for Writ of Certiorari
To The Illinois Appellate Court

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

FCC's assertion that preemption is not an issue (Br. Opp. 3-6), is fallacious. The Illinois Appellate Court squarely construed TILA as barring common law claims for breach of contract and fraud. The Appellate Court first noted that FCC "urges us to uphold the . . . dismissal of plaintiffs' [entire] action on the basis that the federal court has determined that [FCC] has complied with the [TILA] and, according to [FCC], compliance with the [TILA] is complete compliance with Illinois law." (Pet. App. 4-5; 673 N.E.2d at 1068) After finding that "compliance with the federal Truth in Lending Act is . . . compliance with the Illinois Credit Card Issuance Act (Pet. App. 6; 673 N.E.2d at 1070), the Appellate Court also found that: ". . . because defendant has complied with the federal Truth in Lending Act, plaintiffs cannot state a claim for either common law fraud or breach of contract. . . . [B]ecause defendant complies with the federal law, it could not have breached its contract with plaintiffs." (Pet. App. 7; 673 N.E.2d at 1070-71)

Except for application of federal preemption, there is absolutely no basis for the Appellate Court's conclusion that the common law claims are barred. Like a rose, "preemption" is preemption whether or not that word is found in the opinion below.

The Appellate Court clearly interpreted a federal statute, TILA, to bar the prosecution of state common law claims and this Court, it is respectfully submitted, has jurisdiction to review that erroneous decision and, for the reasons stated in the Petition, reverse it.[1]

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[1] On another issue, FCC also asserts erroneously and without any basis in the record that for 26 years the Federal Reserve Board (the "Board") has approved its deceptive practice of advising cardholders that they have a 20 day grace period when they actually have 25. (Br. Opp. 12-

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14). FCC relies on a Board staff interpretive letter dated May 10, 1971. *Id.* However, the content of that letter was neither reviewed nor approved by the Board itself. Moreover, in 1982, the Board explicitly repealed all staff interpretations, including the 1971 letter upon which FCC relies. Amendments to Regulation Z, 46 Fed.Reg. 20, 892 (1981).